Supreme Court U.S.
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No. 01-1316

In The

Supreme Court of the United States

CITY OF SEATTLE,

Petitioner,

v.

NICK FURFARO; BRANDY KIDDER; ESMERALDA SILVA; AND JJR, INC.,

Respondents.

On Petition For A Writ Of Certiorari To The Supreme Court Of The State Of Washington

BRIEF IN OPPOSITION

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CONSTITUTIONAL PROVISIONS AND STATUTES

Title 28 United States Code § 1257(a) provides:

> Final judgments or decrees rendered by the highest court of a State may be reviewed by the Supreme Court by writ of certiorari where the validity of a treaty or statute of the United States is drawn in question or where the validity of a statute of any State is drawn in question on the ground of its being repugnant to the Constitution, treaties, or laws of the United States, or where any title, right, privilege or immunity is specially set up or claimed under the Constitution or the treaties or statutes of, or any commission held or authority exercised under, the United States.

Article I, § 5 of the Washington Constitution provides:

> Every person may freely speak, write and publish on all subjects, being responsible for the abuse of that right.

Article I, § 7 of the Washington Constitution provides:

> No person shall be disturbed in his private affairs, or his home invaded, without authority of law.

In the pertinent part, Seattle Municipal Code § 6.270.100 provides:

> A(2) No employee or entertainer shall perform acts of or acts which simulate:
>
> > a. Sexual intercourse, masturbation, sodomy, bestiality, oral copulation, or any sexual acts prohibited by law;

b. The touching, caressing or fondling of the breasts, buttocks, or genitals; or;

c. The displaying of the pubic region, anus, vulva, or genitals; except as provided for in subdivision 1 of this subsection.

C. This chapter shall not be construed to prohibit expression, such as:

1. Plays, operas, musicals, or other dramatic works that are not obscene.

2. Classes, seminars, and lectures held for serious scientific or educational purposes that are not obscene; or

3. Exhibitions, performances, expressions or dances that are not obscene.

D. For purposes of this chapter, an activity is "obscene" if:

1. Taken as a whole by an average person applying contemporary community standards the activity appeals to a prurient interest in sex;

2. The activity depicts patently offensive representations, as measured against community standards of:

a. Ultimate sexual acts, normal or perverted, actual or simulated; or

b. Masturbation, fellatio, cunnilingus, bestiality, excretory functions, or lewd exhibition of the genitals or genital area, or violent or destructive sexual acts, including but not limited to human or animal mutilation, dismemberment, rape or torture; and

3. The activity taken as a whole lacks serious literary, artistic, political, or scientific value.

STATEMENT OF THE CASE

Rick's is a non-alcoholic nightclub in Seattle that features nude dancing by female entertainers. Individual dancers perform strip tease routines in rotation on a stage accompanied by pre-recorded music. Each dance lasts two to three minutes, the length of a song.

On November 20, 1995, Seattle Police Detective Ken Swanson entered Rick's in an undercover capacity. As part of a pre-planned vice unit operation, Detective Swanson was investigating whether dancers were violating Seattle Municipal Code § 6.270.100, subsection (A)(2), by touching themselves on the breasts, buttocks, genitals or anus, or engaging in simulated masturbation, while performing on stage. Detective Swanson sat in front of the main stage and using a hidden tape recorder, recorded his observations of each of the dancers as they performed in succession on stage. Detective Swanson would turn on the tape recorder and make a verbal notation when he saw dancers touch or "massage" themselves in their private areas. However, he made no effort to observe the entire performance, nor to determine whether it was obscene.

After recording his observations, Detective Swanson left the business and met with other vice unit officers at a pre-arranged location. A group of officers then entered Rick's and arrested thirteen dancers and the manager

based on Detective Swanson's observations. When the officers entered the business, the lights were turned on and the customers were invited to leave. The dancers who were arrested were required to change clothes, hand over their costumes as evidence, and were taken to jail. The business was closed for approximately an hour and twenty minutes while the arrests were being made.

It was uncontested at trial that all acts leading to the arrests occurred while the individual dancers were performing a dance. (Resp. App. 10-20.) In his testimony, Detective Swanson described the dancing of Darcy Poole, one of the entertainers arrested in the raid. He testified that Poole was dancing and moving "in sync" with the music. She did not stop dancing to touch herself but the touching was interspersed throughout the entire performance. The touching lasted two to three seconds. Poole removed her costume slowly as part of a strip tease routine. Detective Swanson testified that all the performances that he observed that day were similar to that of Poole. All the entertainers appeared to be dancing and the touching was part of their dance.

In making their determination of probable cause, the arresting officers were exclusively concerned with whether dancers touched themselves on prohibited body parts. They paid no attention to the performances as a whole and did not consider obscenity. Captain Dan Oliver, the commanding officer of the operation, testified that if a dancer was observed touching herself on the breast she would be arrested, "even if she was doing a ballet". (Resp. App. 23.)

All of the dancers who were arrested were charged in the Seattle Municipal Court with violating Seattle Municipal Code § 6.270.100. One of the dancers went to trial and was acquitted. The charges against the remaining dancers were dismissed. Thereafter, the Respondents filed this civil action in state court. Respondents sought injunctive and declaratory relief and damages pursuant to Title 42 United States Code § 1983 based upon violation of their rights under the First, Fourth and Fourteenth Amendments. They also sought injunctive and declaratory relief based upon violation of their rights under the freedom of expression and privacy provisions of the State Constitution. Respondents claimed that the arrests were unlawful because the arresting officers failed to consider whether their performances were obscene and they failed to obtain a warrant.

Prior to trial, the trial court granted partial summary judgment to the City, ruling that the police were not required to obtain a warrant, and that the individual officers named as defendants in the lawsuit were immune. The matter then proceeded to trial on the issue of probable cause and damages. The trial court reserved ruling on the claims for injunctive and declaratory relief under the State Constitution until after trial. In the course of its deliberations, the jury sent out a written question asking whether the officers were required to consider obscenity in making their determination of probable cause. Over objection, the trial court instructed the jury that the officers were required to consider obscenity in making an arrest for expression but not if they were making an arrest for conduct. The jury proceeded to

return a verdict for the City. Following the verdict, all of Respondents' remaining claims were dismissed.

Respondents appealed the judgment directly to the Washington Supreme Court, which transferred the case to the Court of Appeals.[1] In their brief, Respondents argued that the arrests were unlawful under both the federal and state constitutions. The Court of Appeals reversed the judgment holding that the police violated the First and Fourth Amendments when they arrested Respondents for their stage performances, without first obtaining a judicial determination of obscenity. (Pet. App. 28-45.) The Court of Appeals remanded the case for trial on damages under 42 U.S.C. § 1983 and for injunctive and declaratory relief under the federal and state constitutions. (Pet. App. 45.)

Before the remand order could be carried out, the City petitioned for review of the Court of Appeals' decision by the Washington Supreme Court, and the request for review was granted. A majority of the Washington Supreme Court affirmed the judgment of the Court of Appeals but on different grounds. (Pet. App. 2.) The Court held that a warrant was not required under the First and Fourth Amendments and that Respondents' state constitutional claims did not give rise to a cause of

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[1] Under the Washington Rule of Appellate Procedure 4.2(a)(4), a party may seek direct review of a trial court decision by the Washington Supreme Court if the case involves, "a fundamental and urgent issue of broad public import which requires prompt and ultimate determination". After the appeal is filed directly in the Washington Supreme Court, the Court may decide that grounds for direct review do not exist, in which case the matter is transferred to the Court of Appeals. *See*, RAP 4.2(e).

action under Title 42 United States Code § 1983. However, the Washington Supreme Court held that the police were required to consider obscenity in their determination of probable cause and therefore the jury was erroneously instructed that obscenity need not be considered. The case was remanded for a trial on the question of whether there was probable cause to believe that the dancing was obscene, and damages under § 1983.

Respondents filed a timely motion for reconsideration in the Washington Supreme Court. In the motion, Respondents argued the Court incorrectly stated in its opinion that the only issue raised on appeal was Respondents' claim for damages under § 1983 and the Court failed to address their claim for injunctive and declaratory relief under the state constitution. Respondents asked the Court to either consider the merits of their state constitutional claims or remand them for determination by the Court of Appeals.[2] The Washington Supreme Court granted reconsideration and changed its opinion. In the order granting reconsideration, the Court deleted the language from its opinion which precluded Respondents from seeking injunctive and declaratory relief under the federal and state constitutions and it remanded the case to the Court of Appeals, "to consider the

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[2] RAP 13.7(b) in the pertinent part provides, "If the Supreme Court reverses a decision of the Court of Appeals that did not consider all the issues raised which might support that decision, the Supreme Court will either consider and decide those issues or remand the case to the Court of Appeals to decide those issues."

availability of injunctive and declaratory relief under the state constitution and issues left unresolved by this opinion."

REASONS FOR DENYING THE WRIT

Respondents maintain that the Washington Supreme Court incorrectly interpreted and applied federal law, but not for the reasons set forth in the petition.[3] In seeking to invoke this Court's certiorari jurisdiction, Petitioner has misstated the facts and mischaracterized the holding of the Washington Supreme Court. When these mischaracterizations are exposed and clarified, it becomes apparent that the Washington Supreme Court's rulings about which the City complains are unworthy of review. In any event, this Court lacks jurisdiction to entertain the petition because the judgment in state court is not final and there are unresolved issues of state and federal law. Moreover, in its present posture, this case does not fall within any of the exceptions to the final judgment rule set forth in this Court's decision in *Cox Broadcasting v. Cohn*, 420 U.S. 469, 95 S. Ct. at 1079, 43 L. Ed.2d 328 (1975). Therefore, the petition should be denied.

[3] As argued in their conditional cross petition, Respondents maintain that the Washington Supreme Court erred in failing to require the police to obtain a warrant and in permitting the police to vindicate their arrests through an after-the-fact determination of probable cause.

A. When Petitioner's Mischaracterizations Of The Record And The Holding Of The Washington Supreme Court Are Corrected, It Is Clear That Neither Of The Questions Presented In The Petition Are Worthy Of Review

Contrary to Petitioner's claims, the Washington Supreme Court did not extend significant new federal protection to adult entertainers, did not hold that all conduct occurring on a stage is presumptively protected expression, did not grant First Amendment protection to lap dancing or live sex acts, and did not hold that all conduct which an officer observes must be determined by him or her to be obscene regardless of what it consists of. These are gross exaggerations of the unremarkable holding of the Washington Supreme Court regarding the scope of Seattle Municipal Code § 6.270.100.

The Washington Supreme Court's decision follows from its earlier decision in *O'Day v. King County*, 109 Wn.2d 796, 749 P. 2d 142 (1988) which involved a King County Ordinance identical to the Seattle Ordinance applied in this case. The decision in *O'Day* was expressly based upon Article I, § 5, the free expression clause of the Washington Constitution, rather than the First Amendment. *Id.* at 802. The King County Ordinance provided:

> No employee or entertainer shall perform acts of or acts which simulate:
>
> (a) Sexual intercourse, masturbation, sodomy, bestiality, oral copulation, flagellation, or any sexual acts prohibited by law; or
>
> (b) The touching, caressing, or fondling of the breasts, buttocks or genitals; or

> (c) The displaying the pubic hair, anus, vulva or genitals; except as provided for in subdivision 6 of this subsection and section 6.08.050(D)(3) of this chapter.

Subsection 6 referred to in standard (c) required performances involving nudity to take place on a stage six feet from the nearest patron and eighteen inches off the ground. Section 6.08.050(D)(3) provided that the Chapter should not be construed to prohibit exhibitions or dances that are not obscene.[4]

The plaintiffs in *O'Day* argued that the King County ordinance was overbroad because the non-obscene dance exception only applied to the activities described in standard (c), and not to those described in (a) or (b) and therefore it banned constitutionally protected expression. The Washington Supreme Court acknowledged that the regulation was overbroad but elected to cure the defect by a judicial construction, which involved reading the non-obscene dance exception into standards (a) and (b). The Court stated:

> By themselves, the standards of conduct are overly broad and reach protected expression. However, the non-obscene dance dramatic works exception, the scientific and educational purposes exception, and the non-obscene dance exception of KCC 6.08.050(D) read together with the standards of conduct, can limit chapter

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[4] The definition of obscenity in the King County Ordinance, like the definition of obscenity in the Seattle Ordinance, follows the definition contained in this Court's decision in *Miller v. California*, 413 U.S. 15, 93 S. Ct. 2007, 37 L. Ed.2d 419 (1973).

> 6.08's application to pure conduct and obscene expression.

109 Wn.2d at 806.

In another part of the opinion, the Court in *O'Day* upheld that portion of the King County ordinance which required that nude dancing take place on a stage set back six feet from the audience, because it was aimed at curbing illegal conduct rather than expression. 109 Wn.2d at 808-810. However, in order to draw a distinction between nude expression, which is protected by the Washington Constitution, and nude conduct which is not, the Court limited the ban on self-touching private body parts and on engaging in simulated sex acts to activities which do not occur as part of non-obscene expression such as dance. In other words, under the King County ordinance construed in *O'Day*, if simulated sex acts are performed in the course of expression, obscenity under the *Miller* test is an element of the crime, *as a matter of state law.*

In this case, the Washington Supreme Court merely applied this Court's general probable cause test to the Seattle ordinance as judicially construed in *O'Day*. Probable cause exists where the facts and circumstances within the officers' knowledge of which they had reasonably trustworthy information are sufficient in themselves to warrant a man of reasonable caution in the belief that an offense has been committed. *Brinegar v. United States*, 338 U.S. 160, 175, 69 S. Ct. 1302, 93 L. Ed. 879 (1949); *Dunaway v. New York*, 442 U.S. 200, 99 S. Ct. 2248, 60 L. Ed.2d 824 (1979). According to the decision in *O'Day*, if simulated sex acts are performed in the course of non-obscene expression, then the individuals performing the acts have

not committed a crime. The Washington Supreme Court simply held that if officers charged with making the arrest are confronted with colorable expression, they must consider obscenity, since otherwise there is no reasonable basis for believing that a crime has occurred.

According to the Washington Supreme Court, the necessity of an obscenity determination arises when arresting officers observe what appears to be expression. Relying on this Court's decision in *City of Erie v. Pap's A.M.*, 529 U.S. 277, 120 S. Ct. 1382, 146 L. Ed.2d 265 (2000), the Washington Supreme Court held that nude dancing is expressive conduct. (Pet. App. 18). Since the uncontested evidence was that Respondents were engaged in nude dancing, an obscenity determination was required. The court stated:

> In Kidder's case and in Silva's case, if performers were engaged in nude dancing, their activities would fall under the category of expressive conduct and not pure conduct. There is ample evidence in the record to indicate that the performers were dancing; the detective present testified to that effect. Rep. Tr. (Dec. 11, 1997) at 10. Thus the performers were engaged in expressive conduct which potentially falls under the exception for protected expression in SMC 6.270.100(C). Since SMC 6.270.100(C) says that "[t]his chapter shall not be construed to prohibit protected expression," before officers making arrests for violations of the standards of conduct in SMC 6.270.100(A), the arresting officers or a judicial officer must make a determination, *where expressive conduct is involved*, that the expressive conduct is obscene as defined in SMC 6.270.100(D). In order to have probable

> cause to arrest Kidder and Silva, the city needed probable cause to believe that the dancers' expressive conduct was obscene and hence unprotected by the exception in .100(C).

(Pet. App. 18, 19).

It is apparent that the Washington Supreme Court drew a fact-based distinction between the dancing which occurred in this case, which requires an obscenity determination, and other activities which might not require that determination. Notwithstanding Petitioner's suggestion to the contrary, the Washington Supreme Court did not hold that an obscenity determination is required regardless of what officers observe nor did it hold that that live sex acts or lap dancing would require a determination of obscenity. (Pet. 12-14.) Based upon the language in the ordinance, and the judicial construction given to the ordinance in *O'Day*, the Washington Supreme Court drew a workable distinction between the type of live entertainment that requires an obscenity determination and that which does not. As pointed out in the conditional cross petition, the Washington Court strayed from the First and Fourth Amendments in holding that the police as opposed to a magistrate are entitled to make the threshold determination of obscenity and in holding that the police need not consider obscenity so long as there is an after-the-fact determination of probable cause to believe that the dancing was obscene. However, neither question is presented in this petition.

Petitioner is incorrect in claiming that Respondents Kidder and Silva denied that they touched themselves and in claiming that they never testified that they

intended to convey a message.[5] At trial, Respondent Kidder testified that she touched herself in a sensual sexy way, and denied that the touching was masturbation. (Resp. App. 2-4.) She testified that the touching was part of her dance and the message that she was attempting to convey was that she was sexy and desirable. (Resp. App. 4, 5.) Respondent Silva testified that she touched her breasts, buttocks, and covered her crotch in the course of her dance, but similarly rejected the City's suggestion that what she did was masturbation. (Resp. App. 5-9.) She testified that she was attempting to convey a sensual, sexy message. (Resp. App. 9.) Petitioner is also stretching the truth in its claim that the officers made arrests for sex acts. In response to questions posed on cross examination, Detective Swanson testified that if he observed masturbation, he would have recorded it on the tape. (Resp. App. 18.) There is nothing on the tape to reflect that he observed this type of activity. (Pet. App. 84-87.)

Each of the questions posed in the petition is based upon a mischaracterization of what the Washington Supreme Court did in this case, a misperception of the record facts, or both. In reality, Petitioner is complaining about the manner in which the ordinance was construed by the Washington Supreme Court, in response to the

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[5] In any case, Respondents' subjective intentions with regard to their message is completely irrelevant to the determination of probable cause, which is based upon the circumstances appearing to the officers or a magistrate at the time of the arrest.

dictates of state law, and is suggesting that the Washington Court incorrectly decided that nude dancing is entitled to a measure of First Amendment protection. The first of these complaints does not give rise to a federal question at all and the second treads on law that is sufficiently well settled that it need not be revisited by this Court. Therefore, the petition should be denied.

B. This Court Lacks Jurisdiction To Grant The Petition Because the Judgment Is Not Final

At present, this case is in the Washington Court of Appeals pending a decision on whether a warrant is required by the free expression and privacy clauses of the State Constitution. Left to be decided is the question of whether Respondents are entitled to injunctive and declaratory relief under the state and federal constitutions and the question of whether there was probable cause to believe that Respondents' dancing was obscene. No judgment has been entered in either the appellate court or the trial court. Following the entry of the remand order on December 15, 2001, the Washington Supreme Court erroneously issued the mandate. However, the Court later recognized the mandate was issued in error and it was recalled. (Resp. App. 24.) Under the Washington Rules of Appellate Procedure, the order from which certiorari is now sought is merely an interlocutory decision.[6]

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[6] RAP 12.5(a) provides, A "mandate" is the written notification by the clerk of the appellate court to the trial court and to the parties of an appellate court decision terminating

A state court judgment is subject to review by this Court only if it is final. *Jefferson v. City of Tarrant*, 522 U.S. 75, 80, 118 S. Ct. 421, 139 L. Ed.2d 433 (1997). Otherwise, Title 28 U.S.C. § 1257(a) operates as a jurisdictional bar. *Id.* This Court has stated that the finality rule "is not one of those technicalities to be easily scorned. It is an important factor in the smooth working of our federal system." *Radio Station WOW, Inc. v. Johnson*, 326 U.S. 120, 124, 65 S. Ct. 1475, 89 L. Ed.2d 569 (1945). To be reviewable, a state court judgment must be final in two senses: it must be subject to no further review or correction in any state tribunal, and it must also be final as an effective determination of the litigation and not of merely interlocutory or intermediate steps therein. *Jefferson*, 522 U.S. at 80. In this case, there has been no final judgment in either sense. The judgment is subject to review and correction in the Washington Court of Appeals and is potentially subject to another round of state appellate review following the trial court's decision. Respondents' claims for injunctive and declaratory relief and the issue of probable cause have yet to be adjudicated and there has been no final determination of the litigation. Since no judgment has been entered in this case, final or otherwise, Title 28 U.S.C. § 1257(a) operates as a jurisdictional bar.

In *Cox Broadcasting Corp v. Cohn*, 420 U.S. 469, 477, 95 S. Ct. 1029, 43 L. Ed.2d 328 (1975), this Court recognized the existence of a limited number of exceptions to the final judgment rule in cases where the highest court of the state has finally determined the federal issue present

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review. No mandate issues for an interlocutory decision of the appellate court."

in a particular case, but in which there are further proceedings in the lower state courts to come. In regard to these exceptions, this Court stated:

> In most, if not all of the cases in these categories, these additional proceedings would not require the decision of other federal questions that might also require review by this Court at a later date, and immediate rather than delayed review would be the best way to avoid "the mischief of economic waste and delayed justice," *Radio Station WOW, Inc. v. Johnson*, supra, at 124, 89 L. Ed. 2092, as well as precipitate interference with state litigation.

Id. at 477.

This Court in *Cox Broadcasting* proceeded to describe four specific exceptions. In the first two, the federal issue would not be mooted or otherwise effected by the proceedings yet to be had because those proceedings have little substance, their outcome is certain, or they are wholly unrelated to the federal questions. 420 U.S. at 478. In the other two, the federal issue would be mooted if the petitioner or appellant seeking to bring the action before this Court prevailed on the merits in the later state court proceeding, but there is nevertheless sufficient justification for immediate review of the federal question finally determined in the state courts. *Id.* An analysis of each of the exceptions compels the conclusion that Petitioner cannot establish a basis for disregarding the final judgment rule.

In the first category, there are further proceedings yet to occur in state court, but the prior determination of the federal issue is conclusive or the outcome of further

proceedings preordained. *Cox Broadcasting*, 420 U.S. at 479. "In these cases because the case is for all practical purposes concluded, the judgment on the federal issue is deemed final." *Id.* With this case in its present posture, there are remaining federal issues yet to be adjudicated. These include the Respondents' claim for injunctive and declaratory relief under the First Amendment and Fourth Amendment and the determination of probable cause, not to mention ancillary questions that may arise at trial such as which side has the burden of proof on the issue of probable cause. Therefore, this exception doesn't apply.

The second exception involves cases in which the federal issue, finally decided by the highest court in the state, will survive and require decision regardless of the outcome of further state proceedings. *Cox Broadcasting*, 420 U.S. at 480. This exception is inapplicable if resolution of the claims remaining in state court would moot the federal question presented in the certiorari petition. *Jefferson*, 522 U.S. at 80. If Petitioner prevails on the remaining federal claims, then the issues raised in its petition will become moot. Since the claims presented in the petition may not survive the outcome of future state proceedings, this exception is inapplicable.

In the third category are situations where the federal claim has been finally decided, with future proceedings on the merits in state courts to come, but in which later review of the federal issue cannot be had, whatever the ultimate outcome of the case. *Cox Broadcasting*, 420 U.S. at 481. In these cases, if the party seeking interim review prevails on the merits the federal issue will become moot, and if it were to lose, the governing state law would prevent it from presenting its federal claims for review.

Id. This exception is clearly inapplicable in this case. If Petitioner loses at trial, there is nothing in state or federal law to prevent it from filing another petition for certiorari.

The last exception involves cases where the federal issue has been finally decided in the state courts with further proceedings pending in which the party seeking review might prevail on non-federal grounds, thus rendering unnecessary review of the federal issue by this Court, and where reversal of the state court on the federal issue would be preclusive of any further litigation on the relevant cause of action rather than merely controlling the nature and character of, or the admissibility of, evidence in state court proceedings yet to come. *Cox Broadcasting*, 420 U.S. at 482, 483. In these circumstances, if a refusal to immediately review the state court decision might seriously erode federal policy, this Court has entertained and decided the federal issue which itself has been finally determined by the state courts for purposes of the state litigation. With the case in its present posture, resolution of the federal issues presented in this petition will not end the litigation because there are remaining state claims yet to be adjudicated in state court. Moreover, this case arises from enforcement of a local ordinance wherein a local government has elected to exempt non-obscene nude dancing from criminal liability under the ordinance. Under these circumstances, where a city seeks to vindicate an alleged local interest in regulating adult entertainment, and where, from Petitioner's standpoint, there is no imminently threatened loss of federal rights, no federal

policy will be frustrated if the state courts are given the first opportunity to resolve the remaining claims.[7]

CONCLUSION

Respondents concur that this case presents important federal questions, but not those presented in the petition. The questions in this petition are based on the inaccurate and highly exaggerated contention that the Washington Supreme Court extended presumptive First Amendment protection to any behavior engaged in by a dancer, such that the police are required to consider obscenity whenever they make an arrest. Contrary to the City's claims, the State Court's ruling is expressly limited to situations where officers observe simulated sex acts (or the self-touching of private body parts) performed in the course of dancing on a stage. Since the portion of the state court's ruling complained of by the City does not present broad federal questions, but instead is based upon state constitutional law and well-settled federal law, the petition should be denied.

Moreover, Petitioner is seeking review of an interlocutory order, and this Court therefore lacks jurisdiction

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[7] In *Cox Broadcasting*, and in all the cases which are cited therein as examples of this exception, the state court decision involved a potential abridgement of federal constitutional or statutory rights. 420 U.S. at 482-485. No such potential abridgement exists in this case. From Petitioner's standpoint, the worst thing that can happen is that the state court may elect to overprotect federal rights, which has never been held to be sufficient cause for circumventing the final judgment rule.

to hear the case. The *Cox Broadcasting* exception to the final judgment rule is inapplicable to the present petition because there are unresolved questions of state and federal law which could conceivably moot the question presented in the petition and because, from Petitioner's standpoint, no federal policy or right is imminently threatened if this case awaits the outcome of further proceedings in the state courts.

For all of these reasons, the petition should be denied.

Respectfully submitted,

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APPENDIX

Rep.Tr., Dec. 9, 1997, pp. 52, 63-65
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SUPERIOR COURT OF THE STATE OF WASHINGTON
IN AND FOR THE COUNTY OF KING

NICK FURFARO, BRANDY KIDDER, ESMERALDA SILVA, AND JJR, INC., PLAINTIFFS, VS. CITY OF SEATTLE, ET AL., DEFENDANTS.	66551-6 96-2-02226-8SEA

REPORTER'S TRANSCRIPT ON APPEAL
DECEMBER 9, 1997
BEFORE THE HON. CAROL A. SCHAPIRA

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[52] A. MY NAME IS BRANDY KIDDER AND I LIVE AT 10 OLDE TAVERN DRIVE, WENDELL, NORTH CAROLINA.

Q. HOW OLD ARE YOU?

A. I'M 23. I WILL BE 24 NEXT WEDNESDAY.

Q. ARE YOU MARRIED?

A. NO.

Q. AND ARE YOU ENGAGED?

A. YES, I AM.

Q. AND WHO DO YOU LIVE WITH IN NORTH CAROLINA?

A. I LIVE WITH MY FIANCE DAN AND MY THREE BEAUTIFUL CHILDREN. I HAVE TWO SONS, SIX AND THREE, AND THEN I HAVE A 14-MONTH-OLD GIRL.

Q. WHEN DID YOU MOVE TO NORTH CAROLINA?

A. IN SEPTEMBER OF THIS YEAR.

Q. RECENTLY?

A. YES.

Q. BEFORE THAT TIME, WHERE WERE YOU LIVING?

A. I WAS LIVING IN BOTHELL, WASHINGTON.

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[63] Q. CAN YOU DESCRIBE HOW YOU DANCED ON STAGE THAT DAY?

A. WELL, YEAH. IT WAS PRETTY MUCH NO DIFFERENT THAN ANY OTHER TIME. EVERY TIME I WOULD START MY STAGE PERFORMANCES, I WOULD GO UP TO THE RIGHT SIDE OF THE STAGE. AND THEY HAD A HUGE MIRROR AND I WOULD RUN – I WOULD GET ON THE STAGE. I WOULD RUB MY HANDS ON THE WALK ACROSS THE STAGE WITH MY HAND ON THE MIRROR, A LOT OF EYE CONTACT WITH THE AUDIENCE. I WOULD DANCE MORE OF A FLOWY – BUT IT REALLY WASN'T LIKE A REALLY BUSY DAY OR ANYTHING. I DIDN'T LIKE OVER EXERT MYSELF IN ANY WAY, SHAPE OR FORM. I JUST WAS UP THERE TO ENJOY MYSELF AND LISTEN TO THE MUSIC. I WENT THROUGH A LOT OF

TURNS. I WOULD PUT MY HANDS ALL OVER MY BODY IN THE PACES OF MOVING TO THE MUSIC. AND, YOU KNOW, IT WAS JUST VERY TYPICAL. IT WAS A VERY TYPICAL DANCE.

Q. DID YOU REMOVE YOUR CLOTHING DURING THE [64] DANCES?

A. YES. AT THE TIME, I CAN'T SAY EVERY DANCE I REMOVED ALL OF MY CLOTHING, BUT I AT LEAST MOVED MY TOP DURING EVERY DANCE PERFORMANCE I HAD ON THAT DAY.

Q. YOU SAID YOU TOUCHED YOURSELF ALL OVER YOUR BODY. CAN YOU DESCRIBE THAT IN MORE DETAIL?

A. YES. LIKE WHEN I WOULD TAKE OFF MY TOP, I WOULD – THIS WAS A FRONT TOP, SO IT WOULD UNDO IN THE FRONT. I WOULD TAKE OFF MY TOP AND I WOULD BE MOVING TO THE MUSIC. I WOULD PULL IT OFF AND I WOULD TAKE IT DOWN AND I WOULD TURN AND, YOU KNOW, THROW IT TO THE SIDE, OR GO TO THAT SIDE AND, WITH MY HANDS, I WOULD CARESS MY BODY WITH THE MUSIC. I WAS TOTALLY DANCING, ENJOYING MYSELF. I WOULD RUB MY LEGS, MY THIGHS. MY HAND WOULD GO ACROSS THE BOTTOM SIDE OF MY BUT AND MY BACK. IT WAS ALL FLOWY. MY HANDS DID NOT TECHNICALLY JUST STAY IN ONE AREA. THEY WERE MOVING WITH THE MUSIC AS WELL AS MY BODY WAS.

Q. WAS THIS TOUCHING A PART OF THE REST OF YOUR DANCE?

A. OH, YES. I WAS TOTALLY WITH MY DANCE ROUTINE.

Q. DID YOU EVER MASTURBATE DURING –

A. NO. NO.

Q. – THE STAGE PERFORMANCE?

[65] A. NO. THE TYPE OF DANCING I WAS DOING, THE TOUCHING OF MY BODY COULD NEVER ESCALATE, IN MY OPINION, UPON MYSELF, I WOULD HOPE. ALSO I WOULD NEVER ESCALATE TO THAT POINT.

Q. CAN YOU THINK OF – OBVIOUSLY TRYING TO SHOW US WITH YOUR HANDS, CAN YOU THINK OF WORDS TO DESCRIBE THE WAY THAT YOU TOUCHED YOURSELF?

A. VERY SENSUAL, VERY SENSUAL, SEXY WAY. JUST MY AURA, I GUESS. IT WAS THE WAY I FELT.

Q. WAS THERE ANY PARTICULAR KIND OF MESSAGE OR MEANING TO YOUR DANCING ON-STAGE?

A. YES. I WAS SEXY AND, YOU KNOW, THE PEOPLE OUT THERE, THEY WERE WATCHING ME THAT, YOU KNOW, HEY, I WOULD LIKE TO SPEND A FEW MINUTES WITH HER OR SOME TIME WITH HER. I WANTED THEM TO SEE ME AS A SEXY PERSON.

Q. DID TOUCHING YOURSELF CONTRIBUTE TO THAT MESSAGE?

A. WELL, DANCING, IN THE PROCESS OF TOUCHING MYSELF IN A DANCING WAY, YES.

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[125] DIRECT EXAMINATION +

BY MR. LEVY:

Q. WOULD YOU STATE AND SPELL YOUR NAME.

A. ESMERALDA SILVA, E-S-M-E-R-A-L-D-A, S-I-L-V-A.

Q. MISS SILVA, HOW OLD ARE YOU?

A. I'M 27.

Q. WHAT IS YOUR ADDRESS?

A. 25234 45TH PLACE SOUTH, KENT, WASHINGTON.

Q. WHERE WERE YOU BORN?

A. OTHELLO, WASHINGTON.

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[131] Q. WHEN YOU WERE DANCING AT RICK'S, DID YOU WEAR SOME TYPE OF A COSTUME?

A. YEAH, I HAD MANY DIFFERENT THINGS. I HAD DRESSES. I ALWAYS WORE HIGH HEELS, LIKE FIVE-INCH HEELS. WE CALL THEM HOT PANTS, LIKE SOME PEOPLE CALL THEM DAISY DUKE SHORTS. JUST LACE BRAS AND MATCHING PANTIES, LIKE

SWIM SUIT TYPE OUTFITS, YOU KNOW, THAT WERE COLORFUL.

Q. WHEN YOU WERE DANCING, WOULD THE MUSIC BE PLAYING CONTINUOUSLY THROUGHOUT YOUR DANCE?

A. THE WHOLE TIME.

Q. NOW, YOU MENTIONED THAT AS PART OF YOUR DANCE, THERE WAS SOME TYPE OF COSTUME REMOVAL. WOULD YOU DESCRIBE THAT FOR THE JURY, PLEASE?

A. WELL –

Q. OKAY. I'M SORRY, GO AHEAD.

A. CAN YOU –

Q. DID YOU TAKE IT OFF ALL AT ONCE? DID YOU TAKE IT OFF IN A CERTAIN MANNER?

[132] A. I TOOK IF OFF KIND OF IN A STRIP TEASE WAY, ONE SHOULDER OFF, ANOTHER, PUT IT TO THE SIDE. SOMETIMES I NEVER TOOK ANYTHING OFF. SOMETIMES I MAY HAVE JUST PULLED IT DOWN, PUT IT BACK UP, AS FAR A MY TOP. MY BOTTOMS, I WOULD PULL THEM DOWN A LITTLE TO WHERE NOTHING WAS SHOWING AND THAT WOULD BE ABOUT IT.

Q. YOU MENTIONED, MISS SILVA, TOUCHING YOURSELF. WHAT DO YOU MEAN BY THAT?

A. I TOUCHED MY BREASTS WHEN I WOULD PULL MY PANTIES DOWN BECAUSE I DIDN'T TAKE THEM OFF. I PUT MY HAND TO COVER MYSELF IN

MY CROTCH AREA. I TOUCH MY LEGS, MY ARMS IN THE FLOW OF THE MUSIC. I WOULD PUT MY HAND ACROSS MY BREAST TO COVER, THEN LET, YOU KNOW, OPEN UP. I WAS ALWAYS TOUCHING MYSELF IN THE DANCE.

Q. ALL RIGHT. WHEN YOU TOUCHED YOURSELF ON YOUR BREASTS, WOULD YOU DO THAT CONTINUALLY THROUGHOUT THE DANCE?

A. NO. NO.

Q. FOR WHAT PERIOD OF TIME DURING THE DANCE ROUTINE WOULD YOU BE TOUCHING YOURSELF ON YOUR BREASTS?

A. ARE YOU ASKING ME TO GIVE YOU SECONDS?

Q. APPROXIMATION.

A. THREE TO FIVE SECONDS MAYBE. YOU'RE DANCING, YOU'RE CONSTANTLY MOVING. YOU'RE NOT STOPPING. THE MUSIC IS CONSTANTLY PLAYING. I WOULD GET INTO THE [133] MUSIC AND MY BODY WAS CONSTANTLY MOVING. I JUST DIDN'T STOP AND DO ONE THING. I WAS CONSTANTLY IN THE FLOW OF MOVING WITH THE MUSIC.

Q. WAS THE BREASTS TOUCHING PART OF THE DANCE?

A. MY DANCE, YES.

Q. WHY WAS IT PART OF THE DANCE?

A. TO ME, TOUCHING MY BODY, I FELT I WAS COMFORTABLE WITH MY BODY. IT WAS – TO ME, I

WAS GIVING A SEXY SENSUAL MESSAGE THAT IT WAS PART OF MY DANCE.

Q. DID YOU, AS PART OF YOUR DANCE OR WHILE YOU WERE ON STAGE, TOUCH YOURSELF IN THE CROTCH AREA?

A. AS I STATED BEFORE, I NEVER REMOVE MY BOTTOMS. I WOULD PULL THEM DOWN AS A VISUAL SEXY THING THAT I FELT I WAS BEING SEXY. I PLACED MY HAND TO COVER MY CROTCH AND THAT WAS ALL I DID.

Q. WAS THAT PART OR SEPARATE FROM YOUR DANCE – EXCUSE ME.

WAS THAT PART OF OR SEPARATE FROM YOUR DANCE?

A. IT WAS PART OF MY DANCE. I WAS BEING SEXUAL AND SENSUAL, AND I WOULD DO THAT JUST LIKE I WOULD COVER MY BREAST WITH MY HAND.

Q. DID YOU EVER TOUCH YOURSELF ON THE BUTT?

A. I BELIEVE SO, YES.

Q. WHY?

[134] A. IN THE FLOW OF THE DANCE, I TOUCHED MY LEGS, I TOUCHED MY ENTIRE BODY. I PLAYED WITH MY HAIR. I FLIPPED MY HAIR BACK.

Q. YOU WERE HERE DURING THE EXAMINATION OF MISS KIDDER?

A. YES.

Q. DO YOU RECALL COUNSEL USING THE EXPRESSION OR PHRASE, A "SIMULATED MASTURBATION"?

A. YES, I DO.

Q. DID YOU DO THAT?

A. I DON'T BELIEVE I SIMULATED OR ANYTHING I DID WAS ANYTHING REMOTELY CLOSE TO MASTURBATION.

Q. DID YOU EVER INSERT YOUR FINGERS IN YOURSELF?

A. NEVER.

Q. WHEN YOU WERE DANCING ON STAGES AT RICK'S, WHAT WAS THE MESSAGE THAT YOU WERE TRYING TO CONVEY?

A. AS I SAID BEFORE, I FELT IF WAS BEING EROTIC. THE MUSIC I DANCED TO WAS EROTIC. I WAS GIVING A SEXY SENSUAL MESSAGE.

* * *

SUPERIOR COURT OF THE STATE OF WASHINGTON
IN AND FOR THE COUNTY OF KING

NICK FURFARO, BRANDY KIDDER, ESMERALDA SILVA, AND JJR, INC.,	)	66551-6
PLAINTIFFS,	)	96-2-02226-8SEA
VS.	)	
CITY OF SEATTLE, ET AL.,	)	
DEFENDANTS.	)	

REPORTER'S TRANSCRIPT ON APPEAL
DECEMBER 11, 1997
BEFORE THE HON. CAROL A. SCHAPIRA

* * *

[1] DIRECT EXAMINATION + (RESUMED)

BY MR. LEVY:

Q. DETECTIVE SWANSON, DO YOU RECOGNIZE THE AUDIO TAPE I HAVE JUST PLAYED?

A. YES.

Q. AND IS THAT AN ACCURATE RENDITION OF THE AUDIO TAPE THAT YOU MADE WHEN YOU WENT INTO RICK'S NIGHTCLUB ON NOVEMBER 20TH, 1995?

A. YES, IT IS.

[2] Q. HOW LONG WOULD YOU ESTIMATE THE TAPE WAS, THE RECORD THAT WE HAVE JUST HEARD? TEN MINUTES?

A. SOMETHING LIKE THAT, PROBABLY 10, 15 MINUTES. I WASN'T WATCHING THE TIME.

Q. AND THE LENGTH OF TIME THAT YOU WERE IN THE BUSINESS WAS ROUGHLY 40 MINUTES?

A. THAT'S ABOUT RIGHT.

Q. AND IN TERMS OF THE OBSERVATIONS THAT YOU RECORDED FOR EACH INDIVIDUAL ENTERTAINER, WOULD THAT HAVE BEEN MAYBE 45 SECONDS WORTH OF OBSERVATION PER PERSON ROUGHLY?

A. YEAH. I SUPPOSE AVERAGE, YEAH.

Q. NOW, I HEARD – AND CORRECT ME IF I'M MISTAKEN – I HEARD SOUNDS, AUDIBLE SOUNDS ON THE TAPE INDICATING THAT YOU WERE TURNING THE TAPE RECORDER ON AND OFF; IS THAT CORRECT?

A. THAT'S RIGHT.

Q. NOW, IF WE COULD, PLEASE, DO YOU RECALL – WOULD YOU TAKE A LOOK AT 4 IN YOUR BOOK THERE, PLEASE. EXCUSE ME, I'M SORRY. WOULD YOU LOOK AT ITEM NUMBER 5?

A. YES. I HAVE IT.

Q. AND IS ITEM NUMBER 5, IS THAT THE TRANSCRIPT THAT WE WERE TALKING ABOUT YESTERDAY?

A. YES, IT IS.

Q. NOW, THE FIRST ENTRY ON ITEM NUMBER 5 WHERE [3] IT MAKES REFERENCE TO AN ENTERTAINER BY THE NAME OF GABRIELLE, DID YOU LATER LEARN THAT THAT PERSON WAS THE PLAINTIFF IN THIS CASE, BRANDY KIDDER?

A. YES.

Q. AND AT THE BOTTOM OF PAGE 1 WHERE IT MAKES REFERENCE TO "JESSIE, HISPANIC, FEMALE, LONG, BLACK HAIR," IS THAT THE REFERENCE TO THE PLAINTIFF IN THIS CASE, ESSIE SILVA?

A. YES.

Q. WOULD YOU TURN TO PAGE 3 OF THE TRANSCRIPT WHERE REFERENCE IS MADE TO AN INDIVIDUAL BY THE NAME OF CHANEL?

A. YES.

Q. DO YOU UNDERSTAND THAT THE PERSON THAT YOU REFERRED TO IN THE TAPE AS CHANEL IS AN INDIVIDUAL BY THE NAME OF DARCY POOLE?

A. I BELIEVE THAT'S CORRECT, YES.

Q. DO YOU RECALL MISS POOLE?

A. YES.

Q. DID YOU MAKE ANY OBSERVATIONS OF THE PERFORMANCE OF MISS POOLE OTHER THAN THAT WHICH YOU RECORDED ON THE AUDIO TAPE?

A. I'M NOT SURE I UNDERSTAND WHAT YOU MEAN.

Q. WELL, I'D LIKE YOU TO THINK BACK NOW TO THE FATEFUL DAY OF NOVEMBER 20TH, 1995, AND I'M GOING TO ASK [4] YOU SOME QUESTIONS, A SERIES OF QUESTIONS ABOUT WHAT YOU SAW WHEN YOU WERE OBSERVING MISS POOLE.

WAS MISS POOLE PERFORMING A DANCE?

A. YES.

Q. DID IT APPEAR TO YOU AT THE TIME THAT SHE WAS MOVING IN RHYTHM TO THE MUSIC?

A. YES, SHE WAS.

Q. IN THE COURSE OF THE DANCE, WAS SHE, AS YOU RECORDED ON THE TAPE, SHE TOUCHED HERSELF AND TWEAKED AND POKED HERSELF IN HER PRIVATE AREAS; IS THAT CORRECT?

A. THAT'S CORRECT, YES.

Q. WAS THIS – THE PERFORMANCE ITSELF, WAS THIS A SINGLE PERFORMANCE, A SINGLE CONTINUOUS PERFORMANCE OR DID SHE STOP DURING THE DANCE AND TOUCH HERSELF?

A. YOU MEAN STOP MOVING OR STOP –

Q. STOP MOVING AND DANCING AND JUST TOUCH HERSELF.

A. AH, SHE DIDN'T STOP MOVING TO TOUCH HERSELF, NO.

Q. AT THE CONCLUSION OF THE PERFORMANCE, COULD YOU HEAR IF THE AUDIENCE WAS CLAPPING?

A. I BELIEVE THERE WAS A SMATTERING OF APPLAUSE. I DON'T THINK THERE WERE A LOT OF PEOPLE THERE. YEAH, I THINK THERE WERE A FEW PEOPLE THAT PUT THEIR HANDS TOGETHER.

[5] Q. COULD YOU HEAR THAT ON THE TAPE, SIR?

A. I DON'T RECALL. IT'S POSSIBLE. I DON'T SPECIFICALLY REMEMBER WHETHER YOU COULD HEAR IT AT THE END OF HERS OR NOT.

Q. IN THE CASE OF MISS POOLE, THE TOUCHING THAT YOU OBSERVED AND RECORDED ON THE AUDIO TAPE, WAS THAT INTERSPERSED THROUGHOUT THE ENTIRE PERFORMANCE, OR DID SHE TOUCH HERSELF IN THE PRIVATE AREAS CONTINUOUSLY THROUGHOUT THE PERFORMANCE?

A. IT WAS INTERSPERSED THROUGHOUT THE PERFORMANCE.

Q. DO YOU RECALL THE PHYSICAL DESCRIPTION OF THE MAIN STAGE, SIR? OR DO YOU RECALL WHAT THE MAIN STAGE AT RICK'S LOOKED LIKE WHEN YOU WERE THERE?

A. YES.

Q. COULD YOU TELL THE JURY YOUR RECOLLECTION WHAT IT LOOKED LIKE?

A. IT'S – I'M NOT SURE OF THE DIMENSIONS – ROUGHLY SIX OR SEVEN FEET WIDE, PROBABLY FOUR OR FIVE FEET DEEP. THERE ARE MIRRORS AGAINST THE REAR WALL, LIGHTS, STAGE LIGHTS

OVERHEAD. THE STAGE ITSELF IS PROBABLY THREE FEET ELEVATED FROM THE MAIN FLOOR.

Q. DO YOU RECALL IF MISS POOLE MADE USE OF THE WALLS AND MIRRORS IN THE COURSE OF HER DANCE?

A. AH, YES, SHE DID. THE MIRRORS. THERE ARE [6] NO WALLS OTHER THAN THE MIRROR ON THE WALL.

Q. CAN YOU DESCRIBE, SIR, THE MANNER IN WHICH SHE MADE USE OF THE MIRRORS?

A. AS I RECALL, SHE WAS FACING AWAY FROM THE AUDIENCE TOWARD THE MIRROR, LEANING WITH HER TORSO FORWARD, HER LEGS AND BUTTOCKS FACING TOWARDS THE AUDIENCE. SHE WAS MOVING HER HIPS, BUT I DON'T REMEMBER SPECIFICALLY ANY OTHER ACTIONS.

Q. DETECTIVE SWANSON, WHEN SHE WAS DOING THE MIRROR MOVE, DID YOU OBSERVE THE POSITION OF HER HANDS?

A. AT ONE POINT, I KNOW THAT BOTH HANDS WERE ON THE MIRROR. I DON'T KNOW WHETHER THEY STAYED THERE OR NOT. I REALLY DON'T REMEMBER THAT CLEARLY.

Q. AT ANY TIME IN THE COURSE OF HER PERFORMANCE, DID SHE KICK HER LEGS?

A. YES, I BELIEVE SHE DID.

Q. I TAKE IT THAT AT SOME POINT IN THE COURSE OF HER PERFORMANCE, MISS POOLE REMOVED THE COSTUME THAT SHE WAS WEARING?

A. YES.

Q. WHEN SHE REMOVED THE COSTUME, DID SHE DO IT SLOWLY AND IN SYNC WITH THE MUSIC?

A. AH, YES, I SUPPOSE YOU COULD SAY THAT. SHE TOOK – I REMEMBER THAT WHEN SHE TOOK HER TOP OFF, SHE WAS MOVING WHEN SHE TOOK IT OFF. AND SHE WAS, AS I [7] RECALL, MOVING IN SYNC TO THE MUSIC. SHE DIDN'T REMOVE IT NECESSARILY IN SYNC TO THE MUSIC, BUT SHE WAS MOVING IN SYNC.

Q. OKAY. I GUESS MY QUESTION HERE, DETECTIVE SWANSON, IS WHEN SHE REMOVED HER COSTUME, DID SHE JUST GRAB IT AND TAKE IT OFF AT ONE POINT IN TIME OR DID SHE REMOVE IT MORE SLOWLY?

A. SHE DIDN'T RIP IT OFF, IF THAT'S WHAT YOU'RE ASKING. SHE UNDID IT AND TOOK IT OFF, I THINK, MORE SLOWLY THAN JUST YANKING IT OFF HER SHIRT OR SOMETHING.

Q. WAS IT KIND OF A TEASE?

A. I SUPPOSE YOU COULD SAY THAT.

Q. NOT YOUR CUP OF TEA?

A. NOT NECESSARILY. BUT, YEAH, I SUPPOSE SO.

Q. WHEN SHE TOUCHED HERSELF ON HER BREASTS OR IN THE CROTCH AREA, APPROXIMATELY HOW LONG DID THE TOUCHING LAST?

A. TWO TO THREE SECONDS APPROXIMATELY.

Q. YOU OBSERVED THE ROUTINE OF MISS POOLE AND YOU ALSO OBSERVED THE ACTIVITIES OF THE 12 OR 13 OTHERS THAT DAY?

A. YES.

Q. HOW WOULD YOU COMPARE THE DANCING OF MISS POOLE TO THE OTHER INDIVIDUALS THAT YOU OBSERVED? WAS IT SIMILAR? DIFFERENT?

[8] A. THEY'RE ALL SIMILAR. THERE IS NOT A GREAT DEAL OF VARIETY. VERY SELDOM, ANYWAY. I THINK SHE HAD A BETTER SENSE OF RHYTHM MAYBE THAN SOME OF THE DANCERS ARE. PROBABLY SLIGHTLY MORE ATHLETIC THAN SOME OF THE OTHER ONES. THE DANCES ARE SIMILAR.

Q. IN REFERENCE TO MISS POOLE AND THE OTHER DANCERS, WOULD YOU SAY THAT YOU SAW THE SAME DANCE MOVES OVER AND OVER AND OVER AGAIN?

A. I WOULD SAY THAT THEY WERE SIMILAR DANCE MOVES REPEATED, YES. SOME OF THE PERFORMERS ARE MAYBE BETTER ABLE TO PUMP THE MOVES OFF, BUT THEY'RE QUITE SIMILAR, YES.

Q. WITH REFERENCE TO MISS POOLE, WOULD YOU SAY THAT SHE MOVED GRACEFULLY?

A. YEAH. SHE KEPT RHYTHM WITH THE MUSIC AND DID NOT APPEAR CLUMSY.

Q. WOULD YOU SAY THAT SHE KEPT A BEAT?

A. I WOULD SAY THAT, YES.

Q. NOW, WITH RESPECT TO YOUR AUDIO NOTES, IF SOMEBODY HAD DONE AN UNUSUAL THING, A VERY UNUSUAL THING IN THE COURSE OF THEIR DANCE, WOULD YOU HAVE MADE A RECORD OF THAT ON THE AUDIO TAPE?

A. I MIGHT HAVE, DEPENDING UPON WHAT THAT UNUSUAL THING WAS.

Q. WELL, FOR EXAMPLE, IF SOMEBODY WERE JUST [9] STANDING UP THERE ON THE STAGE DOING NOTHING BUT MASTURBATING, WOULD YOU HAVE RECORDED THAT ON THE TAPE?

A. I MOST CERTAINLY WOULD HAVE, YES.

Q. WITH RESPECT TO – WOULD YOU LOOK AT 15, PLEASE, EXHIBIT 15 IN YOUR BOOK, DETECTIVE SWANSON?

A. YES.

Q. THERE IS A BUNCH OF PAPERS IN THE FRONT, AND THEN FINALLY WE COME TO A REPORT FOR SOMEBODY BY THE NAME OF APRIL WHITE. DO YOU SEE THAT, SIR?

A. I HAVE IT, YES.

Q. WOULD YOU FLIP OVER TO THE OFFICER'S STATEMENT.

DO YOU RECALL ON NOVEMBER 20TH, 1995 IF APRIL WHITE WAS DOING A DANCE WHEN YOU MADE YOUR OBSERVATIONS CONCERNING THAT INDIVIDUAL?

A. YES, SHE WAS ON THE STAGE PERFORMING, YES.

Q. THE NEXT ONE, TAMMY BERGQUIST?

A. YES, SHE WAS AS WELL.

Q. SHE WAS DANCING?

A. YES.

Q. AND THE TOUCHING, THE TOUCHING THAT YOU OBSERVED WITH MISS BERGQUIST, WAS THAT A PART OF THE PERFORMANCE THAT YOU OBSERVED?

A. IT WAS.

Q. NEXT ONE, GIOVONNA GREENWOOD. IS SHE [10] ANOTHER INDIVIDUAL THAT YOU OBSERVED?

A. YES.

Q. AND WAS SHE DANCING?

A. SHE WAS.

Q. AND WAS THE TOUCHING PART OF HER PERFORMANCE?

A. YES, IT WAS.

Q. SARA LYONS?

A. YES.

Q. SHE WAS DANCING?

A. SHE WAS.

Q. AND THE TOUCHING WAS PART OF HER PERFORMANCE?

A. YES, IT WAS.

Q. WAS THERE ANY INDIVIDUAL IN THIS GROUP THAT WAS NOT DANCING?

A. NO.

Q. WAS THERE ANY INDIVIDUAL IN THIS GROUP THAT YOU OBSERVED WHO TOUCHED HERSELF AND THE TOUCHING WAS NOT PART OF THE PERFORMANCE?

A. I'M NOT SURE – NO. IT WAS – ALL THE ACTIONS THAT I DESCRIBED ON THE TAPE TOOK PLACE DURING THE INDIVIDUAL PERFORMANCE.

Q. TOOK PLACE WHILE THEY WERE DANCING?

A. YES.

[11] MR. LEVY: NO FURTHER QUESTIONS. THANK YOU, SIR.

* * *

SUPERIOR COURT OF THE STATE OF WASHINGTON
IN AND FOR THE COUNTY OF KING

NICK FURFARO, BRANDY KIDDER, ESMERALDA SILVA, AND JJR, INC.,	)	66551-6
PLAINTIFFS,	)	96-2-02226-8SEA
VS.	)	
CITY OF SEATTLE, ET AL.,	)	
DEFENDANTS.	)	

REPORTER'S TRANSCRIPT ON APPEAL
DECEMBER 15, 1997
BEFORE THE HON. CAROL A. SCHAPIRA

* * *

[31] REDIRECT EXAMINATION +

BY MR. LEVY:

Q. CAPTAIN OLIVER, WHEN YOU RECEIVED THE INFORMATION FROM GENERAL INVESTIGATING UNIT OFFICERS CONCERNING OBSERVATIONS THAT THEY MADE IN THE NIGHTCLUBS BEFORE NOVEMBER OF 1995, FROM WHOM DID YOU RECEIVE THAT INFORMATION?

A. FROM ABOUT FOUR DIFFERENT INDIVIDUALS.

Q. AND WHEN YOU RECEIVED THAT INFORMATION, DID THEY GIVE IT TO YOU VERBALLY OR IN WRITING?

A. THEY GAVE IT TO ME VERBALLY.

Q. DID YOU SEE ANY DOCUMENTS BEFORE NOVEMBER OF [32] 1995, ANY DOCUMENTS WHICH HAD BEEN PRODUCED BY THE VICE SECTION OR – EXCUSE ME – THE GENERAL INVESTIGATING UNIT DOCUMENTING THE OCCURRENCE OF THE BEHAVIORS WHICH THEY DESCRIBED TO YOU?

A. NOT THAT I RECALL, NO.

Q. DID YOU VERIFY THAT YOURSELF, THAT THE BEHAVIORS WERE TAKING PLACE?

A. NO, I DID NOT.

Q. NOW, IF YOU WOULD LOOK AT ITEM NUMBER 5. PLEASE LOOK AT WHERE IT SAYS IN THE TOP PARAGRAPH: (READING)

> "GABRIELLE ON THE MAIN STAGE, BLACK SPARKLING STRING BIKINI. SHE TOUCHED HER ANUS, BUTTOCKS, MASSAGED HER BREAST."

IF AN OFFICER SAW GABRIELLE TOUCHING HER BUTTOCKS, IN YOUR ESTIMATION, SIR, WOULD THAT CONSTITUTE PROBABLE CAUSE TO PLACE HER UNDER ARREST?

A. ACCORDING TO THE ORDINANCE, IF I REMEMBER IT RIGHT, IT SAYS IF YOU TOUCH, MASSAGE OR FONDLE.

Q. SO THE ANSWER IS YES?

A. BY THE ORDINANCE, BUT HE WAS ALSO GIVEN INSTRUCTION BY ME WHAT I INTERPRETED TOUCHING TO BE.

Q. BUT ACCORDING TO THE ORDINANCE, ACCORDING TO YOUR UNDERSTANDING OF THE ORDINANCE, IF GABRIELLE TOUCHED HER BUTTOCKS, THAT WOULD BE PROBABLE CAUSE FOR AN ARREST?

[33] A. SHE COULD BE ARRESTED ON PROBABLE CAUSE, YES.

Q. AND IT WOULDN'T MATTER, AS FAR AS YOU WERE CONCERNED, WHETHER THIS TOUCHING TOOK PLACE IN THE COURSE OF A BALLET?

A. MY INSTRUCTIONS WERE DIFFERENT.

Q. IF GABRIELLE HAD MASSAGED HER BREAST IN THE COURSE OF A BALLET DANCE, IT WOULDN'T MAKE ANY DIFFERENCE TO YOU WHETHER SHE WAS DANCING A BALLET OR NOT, YOU WOULD STILL HAVE PROBABLE CAUSE FOR AN ARREST?

A. ACCORDING TO THE ORDINANCE UNDER ADULT ENTERTAINMENT, IF THEY'RE ON STAGE AND THEY ARE DOING IT AND THEY WERE MASSAGING THEIR BREAST, HE WOULD ARREST THEM.

Q. EVEN IF SHE WERE DOING A BALLET?

A. EVEN IF SHE WAS DOING A BALLET.

* * *

THE SUPREME COURT OF WASHINGTON

NICK FURFARO, BRANDY KIDDER, ESMERALDA SILVA, and JJR, INC. Respondents, v. CITY OF SEATTLE, Petitioner.	NO. 68971-7 **ORDER RECALLING MANDATE** (Filed Jan. 7, 2002) King County No. 96-2-02226-8 SEA C/A No. 43409-8-I

A mandate was issued in this case on December 27, 2001, which in pertinent part stated: "This cause is mandate to the superior court from which the appeal was taken for further proceedings in accordance with the attached true copy of the opinion." However, the Court issued an Order Changing Opinion on December 5, 2001, which remanded the case to the Court of Appeals for further proceedings. Therefore, the mandate was issued in error.

Pursuant to RAP 12.9(b), the mandate issued on December 27, 2001, is recalled and the case is remanded to the Court of Appeals for further proceedings in accordance with the Order Changing Opinion issued by this Court.

DATED at Olympia, Washington this 7th day of January 2002.

/s/ C. J. Merritt
C. J. MERRITT
SUPREME COURT CLERK

The Court of Appeals
of the
State of Washington
Seattle
98101-4170

RICHARD D. JOHNSON,
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March 27, 2002

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Case No. 43409-8-I, ***Nick Furfaro et al., v. City of Seattle.***

RE: Request for briefing.

Dear Counsel:

We have reviewed the Supreme Court's order dated December 5, 2001, granting reconsideration and changing the Court's opinion. Based on a review of the briefing, records and files in this case, this court has determined

that it would be helpful to have further briefing from the parties.[1]

In its order, the Supreme Court remanded this case pursuant to RAP 13.7(b) "to consider the availability of injunctive or declaratory relief under the state constitution and issues left unresolved by this opinion." The Supreme Court stated in the order that "State constitutional claims for injunctive and declaratory relief arising under Washington Constitution article I, section 5, are remanded to the Court of Appeals, Division One, for further appropriate proceedings."

Accordingly, this court requests that the parties provide briefing on the claims identified above. The parties may additionally wish to address what further proceedings they feel are appropriate with respect to the issue of the availability of declaratory or injunctive relief under article I, section 5 of the Washington Constitution.

This court has Furfaro's opening brief, dated June 30, 1998, the City's response, dated August 31, 1998, Furfaro's reply, dated September 25, 1998, all of which were originally filed in the Supreme Court and later transferred to this court as the basis for the appeal decided by this court. We have Furfaro's supplemental brief filed with the Supreme Court on July 3, 2000 and the City's supplemental brief filed with this court on the same date. We also have the City's subsequent petition for review in the Supreme Court, and Furfaro's response thereto as

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[1] RAP 10.1(h) provides that an appellate court may direct the filing of briefs on the merits other than those specified in the Rules of Appellate Procedure.

well as Furfaro's motion for reconsideration of the Supreme Court's opinion and the City's opposition thereto.

This material is sufficient to represent Furfaro's opening position on the merits of the issues remanded. Therefore, we request that the City of Seattle file a responsive brief within 30 days of receipt of this letter with a copy served upon counsel of record in this case. Upon receipt of the City's responsive brief, Furfaro et al. will have 30 days to file a reply brief. Each brief should be no longer than 25 pages.

Sincerely,

/s/ Richard D. Johnson
Richard D. Johnson
Court Administrator/Clerk

CoA